STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 7, 2000
v	No. 202104 Genesee Circuit Court
ANDRE CATHRON, Defendant-Appellant.	LC No. 96-053707 FC

Before: White, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of two counts of armed robbery, MCL 750.529; MSA 28.797, receiving and concealing stolen property in excess of one hundred dollars, MCL 750.535; MSA 28.803, and first-degree home invasion, MCL 750.110a; MSA 28.305(a). Defendant was sentenced to twenty to fifty years' imprisonment for each armed robbery conviction, three to five years' imprisonment for the receiving and concealing stolen property conviction, and ten to twenty years' imprisonment for the first-degree home invasion conviction. We affirm.

Defendant was originally tried with codefendant Stephen Terry, in August 1996. Terry was convicted of two counts of armed robbery, first-degree home invasion and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The jury was hung as to the counts against defendant.

The prosecution's theory at both trials was that defendant aided and abetted the robbery of the two victims, Connie Thomas, and her teenage daughter, Teika, on February 6, 1996, and drove the get-away car after the robbery. The prosecution asserted that defendant had visited Teika several times at the Thomas home in the weeks before the robbery, and that the two other men involved in the robbery, neither of whom the Thomas' had met and thus would not recognize, did the actual robbery. The prosecution theorized that the three men went to the Thomas house in a stolen car, that the other two men entered the Thomas' house forcibly, held a gun on the victims, ransacked the house, stole various items from it, loaded them in the stolen car, and with defendant driving, drove away.

Defendant's theory was that too many pieces were missing from the prosecution's case, in that neither of the victims would testify that they saw defendant, nobody saw defendant driving the get-away car or running from the car, or entering the vacant house at which he was arrested. Defendant contended that he had nothing to do with the crimes and was in the vacant house because he was interested in purchasing it.

I

Defendant first argues that the trial court abused its discretion when it admitted hearsay testimony of Jemein Jones, who testified to statements that Stephen Terry made to him implicating defendant in the crimes, without the prosecution having established that Terry was unavailable, as required under MRE 804(a). The prosecution argues that defendant failed to preserve this issue by specifically objecting on the basis of unavailability at either trial and, alternatively, that if there was error it was harmless because the defense called Terry as a witness at the second trial and thus had the opportunity to cross-examine him.

We review the trial court's decision to admit evidence for abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). Decisions regarding the admission of evidence that involve preliminary questions of law, e.g., whether a rule or statute precludes admissibility of the evidence, are questions of law this Court reviews de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Statements against penal interest are an exception to the hearsay rule, MRE 804(b)(3), but are admissible only if the declarant is unavailable to testify. MRE 804(a). The burden is on the defendant to demonstrate that a preserved, nonconstitutional error resulted in a miscarriage of justice. *Lukity, supra* at 494. No judgment or verdict shall be reversed in any criminal case on the ground of improper admission of evidence unless after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. MCL 769.26; MSA 28.1096; *Lukity, supra* at 491. The inquiry whether the error is prejudicial focuses on the nature of the error and its effect in light of the weight and strength of the untainted evidence; nonconstitutional error is not a ground for reversal unless it is more probable than not that the error was outcome determinative. *Lukity, supra* at 495.

A

At the first trial, the prosecution argued that Jemein Jones' testimony that Terry made statements implicating defendant was admissible under *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993), which held that where

> the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement—including portions that inculpate another—is admissible as substantive evidence at trial pursuant to MRE 804(b)(3). In reaching this conclusion, we are guided by the comment of the Advisory Committee for the Federal Rules of Evidence concerning FRE 804(b)(3), on which the Michigan rule is modeled:

> Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest . . . . On the other hand, the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying. [*Id.* at 161.]

The *Poole* Court went on to evaluate whether admission of the statement violated the defendant's Sixth Amendment right of confrontation, noting that admission of the statement

> does not violate the Confrontation Clause if the prosecutor can establish that Downer [the declarant] is unavailable as a witness and his statement bears adequate indicia of reliability *or* falls within a firmly rooted hearsay exception.
>
> Because Downer is also being prosecuted for the same offenses Poole is charged with, and the statement at issue relates to those charges, the prosecutor is unable to call him as a witness in this case. Downer is therefore unavailable as a witness. [*Id.* at 163.]

The prosecution in the instant case argued at the first trial regarding the declarant's unavailability:

> The Supreme Court says [in *Poole*] if the witness is unavailable, then that's no problem. And both in the Poole case and in this case it's the same scenario. The witness is unavailable, Terry is unavailable, because he's the co-defendant, just like the co-defendant in the Poole case is unavailable. I can't call Terry; Mr. Beauvais [defendant's counsel] can't call Terry. Whether Terry testifies is Terry's own choice. And so, they said in this case, since the prosecutor could not call the co-defendant, that person was unavailable, and takes care of the confrontation clause issue.

Defendant's counsel argued in response that cases other than *Poole*

> clearly say that a statement by a co-defendant which includes statements that would be against the interest of a co-defendant, that they are clearly not admissible in the case in chief or as substantive evidence against that person. In fact, the courts have taken great pains in dealing with even redacted versions of those statements where there should not be any reference to the co-defendant from the standpoint that the jury would even make an inference that the person that is mentioned, if they say friend or somebody else, could be this person.

Defense counsel also argued that Jones' testimony regarding Terry's statement was unreliable.[1] The court permitted Jones to testify pursuant to *Poole*.

At defendant's second trial, defendant again objected to the admission of Jones' testimony. The court discussed the matter in chambers with the attorneys, and Jones was permitted to testify.

Jones testified that he knew Terry, had testified at the first trial in August 1996, and had given Officer Mata a statement in March of 1996. Jones testified that in the early evening of the date in question, Terry came to his house, was dirty and breathing hard, and explained where he had just been:

A. He told me that him and his friend, his two friends, had – had hit a lick. They had robbed – robbed – set up a robbery.

Q. Okay. Did he use the name of either of his two friends?

A. Yes.

Q. What did he – what did he say?

A. I – I just remember one name. I can't remember the other.

Q. What name do you remember?

A. Drey.

Q. Drey? Based upon what he was saying and the way he was acting, was he referring to something that had just happened, or something that had happened in the past?

A. Somethin' that had just happened.

Q. Okay. And did he give any detail on how the robbery happened?

A. Yes.

Q. What did he say?

A. He said that –what did he say? He said they went to a flower shop or balloon shop or somethin' and got some balloons. Went over to the house and Steve knocked on the door. And when they opened the door that he had pulled out the gun, you know. He said that he had tied the lady up and Drey had took the young girl in the back room. And . . . let's see. I don't know. That's about it.

Q. Is that about what you can remember?

A. Yeah.

Q. Okay. And –let me see.

* * *

BY MR. BEAUVAIS:

Q. Mr. Jones, did you know Stephen Terry's last name at that time?

A. It was Terry – Stephen Terry.

Q. Back in February 1996 did you know what his last name was?

A. No.

Q. And when was the last time before February of 1996 that you had seen Stephen Terry?

A. Probably back in the summer –that summer.

Q. And has Stephen Terry ever been to that house that you were living at at that time before?

A. No.

Q. In fact, when did you move into that house?

A. We had moved in there in January.

Q. Of that year?

A. Right.

* * *

Q. Now, in your prior testimony there were times that you testified that it was just Terry and one of his friends. Correct?

A. I didn't know the –the third party, whoever was with 'em. All I remember was Drey – the name.

Q. And do you recall testifying back in August of 1996?

A. Yes.

Q. Do you remember being asked: "What did he tell you?"

"He told me him [sic] and his friend –" singular "—had robbed –had robbed somebody."

Do you recall saying that?

A. Yeah.

Q. Do you know who Drey is?

A. I just know him from the last time I was here.

* * *

Q. And you don't know if it's him now, do you? You don't know who Drey is. You didn't know it then [in August 1996] and you don't know it now. You just know the name. Correct?

A. Right.

* * *

REDIRECT EXAMINATION

BY MR. PETRIDES:

Q. When Stephen was talking to you was he kind of excited emotionally?

A. He was—he was just himself, you know. I don't know.

Q. Did—when he mentioned to you what had just happened, did he take very long?

A. Not really. About a ten-minute story or somethin'.

Q. Okay. And what you can remember from this, the name Drey stuck in – in what he had to tell you?

A. Yeah.

After Jones testified, the prosecution rested, the jury was excused, and the trial court explained that it had had an in-chambers discussion with the attorneys regarding the admissibility of Jones' testimony regarding Terry's statement, in which the court informed the attorneys that it would be making the same ruling it had made in the earlier trial, and that after Jones' and another witness' testimony, defense counsel would have an opportunity to make a record on the issue. The court then invited defense counsel to make his presentation. Counsel then made an argument similar to that made at the first trial. He argued that Jones statement was not admissible under *Poole* because it was unreliable. Counsel did not assert that MRE 804B(3) was not satisfied because the prosecution had failed to establish Terry's unavailability.[2]

B

Terry chose to testify. He testified that Jones was a cousin or relative of the man with whom Terry committed the robbery, someone named Shamoo. Terry testified that he and Shamoo went to the home to collect a debt owed to Shamoo by someone named Dionco. Connie Thomas answered the door, said Dionco was not there and that she did not know where his money was. Shamoo and Terry searched the house and removed televisions and other items. Terry testified that he was wearing a blue

denim jacket, that he drove the car, that he ran from the car when he saw the police car following them, that the jacket got caught on a fence as he was fleeing and he abandoned it, and that he hid in a garage for several hours. Terry testified that after leaving the hiding place, he went to Jemein Jones', and that Shamoo was already at Jones' when he arrived. He further testified that defendant was not with him. On cross-examination, Terry testified that he had not testified at his trial and was convicted of committing the house robbery of the Thomases. Terry testified that he had told Sergeant Wright about Shamoo, but had not told him that he had been driving the getaway car because his attorney had advised him not to. Terry denied that a third person was involved in the robbery and admitted that he said nothing at his sentencing regarding defendant not being involved. Terry testified that Sergeant Wright had tried to influence him not to let defendant get off.

C

Defendant argues that because the prosecution failed to show that Terry was unavailable, admission of the hearsay testimony was an abuse of discretion. *Lukity, supra* at 488 (noting that when preliminary questions of law are at issue, such as whether a rule of evidence precludes admissibility of the evidence, "it is an abuse of discretion to admit evidence that is inadmissible as a matter of law."); *People v Blankenship*, 108 Mich App 794, 797; 310 NW2d 880 (1981) (rejecting the defendant's argument that because the witness *could have* claimed the Fifth Amendment privilege, he had established that the witness was unavailable for purposes of admission of a statement against penal interest, MRE 804(b)(3), on the ground that the defendant offered no proof that the witness would have asserted the privilege had he been subpoenaed). However, although defendant objected to the admission of Jones' testimony regarding Terry's hearsay statement as unreliable, no objection was raised on the ground that the prosecution had failed to establish Terry's unavailability as required by MRE 804. We therefore conclude that the issue was waived. As to the admissibility of the testimony otherwise, we conclude that the trial court did not err in admitting the testimony under *Poole*. Jones described a narrative to a friend that was on the whole clearly against Terry's penal interest, indicating the reliability of Terry's statement. Whether Terry actually made the statement is a question going to Jones' credibility, not the credibility of the hearsay statement. Jones was subject to cross-examination.

Further, we conclude that if the admission of Jones' testimony regarding Terry's statement was error, it was harmless because the defense called Terry as a witness, and thus had opportunity to cross-examine Terry. And, because Terry testified contrary to the statement, Jones' testimony would have been admissible for impeachment purposes.

II

Defendant next argues that insufficient evidence was presented at the second trial to sustain his convictions. We disagree.

The test for determining whether there is sufficient evidence to support a conviction is whether, viewed in the light most favorable to the prosecution, the evidence is sufficient to permit a rational trier of fact to find the essential elements of the crime to be proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). "Inherent in the task of considering the proofs in

the light most favorable to the prosecution is the necessity to avoid a weighing of the proofs or a determination whether testimony favorable to the prosecution is to be believed. All such concerns are to be resolved in favor of the prosecution." *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654 (1993), overruled on other grounds *People v Lemmon*, 456 Mich 625 (1998).

Defendant's argument regarding the sufficiency of the evidence is not addressed to the elements of the offenses charged, but to the sufficiency of the evidence that defendant was an accomplice in the commission of the offenses.

The victims, Connie Thomas and her teenage daughter, Teika, lived together. Connie Thomas testified that two men came to the door holding inflated helium balloons and asked for Teika by name. She believed that the balloons were for her, her birthday having been two days earlier. As Teika approached the door, the men forced their way into the house, held a gun to the victims, tied the victims up, ransacked the house, and took various items, including televisions and jewelry. Both victims testified that they did not recognize the two men who robbed them, but that the robbers knew them by name. Teika testified that she had known defendant for a time before the robbery, and that defendant had come to her house to see her several times in the weeks before the robbery. Connie Thomas had met defendant on one of the occasions outside the house, when it was dark, and for a short time. She testified that Teika had introduced him as "Drey." Teika testified that a couple of days after the robbery and after defendant was in jail, a friend of hers called her and there was a three-way conversation with defendant, during which defendant tried to bribe her not to testify against him by offering her money and one of his cars. Teika testified that she had not previously reported this conversation because she was scared of defendant.

Officer Mata testified that while on routine patrol around 5:00 p.m. on February 6, 1996, he and his partner, Officer Peck, spotted a 1978 Grand Prix matching the description of a car listed on their hot sheet as stolen, that the license plate matched the stolen vehicle's, and that he turned the patrol car around and pursued the stolen vehicle. He observed the car stop and three men jump out, two from the passenger side went in one direction, and one from the driver's side went in another direction. His focus was on the person who jumped out of the car from the driver's side, who was wearing a jean jacket. Mata pursued the man on foot and within one minute came upon a vacant house and heard noises from within that sounded like someone running and falling. Defendant emerged from the back door, which was open, breathing hard, like he had been running, and surprised to see the officer. Following defendant's arrest, Mata found a blue denim coat behind the garage of the vacant house. Mata testified that water pipes in the house had broken and water was running down from the upstairs bathroom had formed ice on the kitchen floor.

Officer Peck testified similarly, but was unsure whether one or two passengers emerged from the passenger side of the stolen vehicle. When Peck inspected the Grand Prix, he found a number of items that he later learned had been taken from the Thomas' home, and some helium balloons.

Defendant denied involvement in the alleged incidents and testified that he was at the vacant house where he was arrested because he was interested in purchasing the house, which was being sold for $2,500. He testified that he did not have permission to go inside but did so when he saw the door

was open. The prosecution called the owner of the vacant house in rebuttal, who testified that he had received some inquiries about the house, and had told one caller that he would be willing to sell for $2,500, but could not specify when he had spoken to that person.

Although defendant accurately describes the various inconsistencies and conflicts in the testimony and a reasonable jury might have concluded that the prosecution had failed to establish beyond a reasonable doubt that defendant was a participant, viewed in a light most favorable to the prosecution, there was sufficient evidence from which a reasonable juror could find that Terry committed the underlying crime of robbery, that defendant performed acts or gave encouragement which aided and assisted the commission of the crime, and that defendant intended the commission of the crime or had knowledge that Terry intended its commission at the time of giving aid or encouragement. *Genoa, supra* at 463. Officer Mata's testimony could support a finding that defendant was driving the getaway car, which contained items stolen from the Thomas house shortly after the robbery, and that defendant knew the car was stolen. The Thomases' testimony could support an inference that defendant was involved in the episode from the start.

We conclude that although circumstantial, the evidence was sufficient even without considering Terry's statement to Jones as substantive evidence. If that testimony is considered because of the failure to raise the unavailability issue at trial, the evidence of guilt is even stronger.

III

Defendant argues in a supplemental brief that he was denied the effective assistance of counsel based on counsel's failure to call alibi witnesses, failure to specifically object on grounds of unavailability to Jones' hearsay testimony and request a cautionary instruction, and failure to request an instruction on accessory after the fact. We disagree.

To establish a denial of effective assistance of counsel under the state and federal constitutions, a defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed by the Sixth Amendment. *People v Daniel,* 207 Mich App 47, 58; 523 NW2d 830 (1994). The deficiency must have prejudiced the defendant. *Id.* at 58. A defendant must demonstrate that, but for counsel's errors, there is a reasonable probability that the result of the trial would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

Decisions as to what evidence to present and whether to call or question witnesses are presumed to be a matter of trial strategy. *People v Mitchell,* 454 Mich 145, 163; 560 NW2d 600 (1997). In order to overcome the presumption, a defendant must show that counsel was ignorant of and failed to present valuable evidence that would have substantially benefited the defendant. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hoyt,* 185 Mich App 531, 537-538; 462 NW2d 793

(1990). A substantial defense is one which might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

At defendant's first trial, alibi witnesses Shurmyra Love and Camille Powell, defendant's fiancee, testified that defendant left his house on foot the day of the crimes in order to look at a nearby house. Defendant was wearing a brown shirt, brown corduroy pants, brown shoes, and a brown coat, not a blue-jean jacket. The women did not testify at defendant's second trial. Defendant maintains that the testimony from these two women would have greatly assisted in his defense because it would have confirmed defendant's testimony that he was at the vacant house because he was interested in buying it.

Both of these witnesses' credibility was impeached at the first trial by their testimony that they only recently decided to come forward with an explanation for defendant's whereabouts that day. Love was obviously confused about the date in question and admitted that she had not come forward with defendant's alibi until the week of trial, and Powell' testimony that she did not testify on defendant's behalf at the preliminary examination because she was unaware of the charges against him was weak. Defense counsel, as a matter of trial strategy, could have decided that their testimony would not aid defendant's case because of the witnesses' lack of credibility. The testimony of the owner of the vacant house supported to an extent defendant's version of the facts. The owner testified that someone had made inquiries about buying his house and that he had indicated he would sell it for $2,500. Defendant was correct when he testified that the purchase price was $2,500 with $1,000 in back taxes. Thus, given the disinterested testimony of the owner, we conclude that the failure to call the two women did not result in defendant being deprived of a substantial defense. Therefore, defendant did not receive ineffective assistance of counsel for counsel's failure to call Love and Powell.

Defendant's next ineffective assistance of counsel argument is that, should this Court accept the prosecution's argument that defendant did not preserve his challenge to Jones' hearsay testimony, defendant would argue that counsel was ineffective in failing to specifically object on that basis. However, because Terry actually testified in defendant's favor and Jones' testimony would have been admissible for impeachment purposes, we conclude that counsel's failure to object on the grounds of failure to establish unavailability did not affect the result of the case.

Defendant also argues that counsel was ineffective and he was denied a fair trial by counsel's failure to request an instruction on accessory after the fact. Defendant argues that the most the jury could conclude from the evidence was that he drove a stolen car containing stolen property and, possibly, had been somehow involved in disposing of the property. He argues that absent the accessory after the fact instruction, the jury was left with the choice of convicting him of the charged offenses under the aiding and abetting theory, or of acquitting, and that the jury was not aware that an accessory after the fact is not the same as an aider and abettor.

The trial court must instruct on lesser included offenses when requested and if supported by the evidence. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). An accessory after the fact is a person who, with knowledge of the other's guilt, gives assistance to a felon in the effort to hinder the felon's detection, arrest, trial or punishment. *People v Perry*, 460 Mich 55, 62; 594 NW2d 477 (1999).

> When reviewing the propriety of a requested lesser included offense instruction, we first determine if the lesser offense is necessarily included in the greater charge, or if it is a cognate lesser included offense. Necessarily included lesser offenses "must be such that it is impossible to commit the greater without first having committed the lesser." Cognate lesser included offenses "are related and hence 'cognate' in the sense that they share several elements, and are of the same class or category, but may contain some elements not found in the higher offense." [*People v Bailey*, 451 Mich 657, 667-668; 549 NW2d 325 (1996), citing *People v Ora Jones*, 395 Mich 379, 387; 236 NW2d 461 (1975).]

Accessory after the fact is not a lesser included offense of robbery, home invasion or receiving and concealing stolen property, because it need not be committed as part of the greater offenses. Nor is it a cognate lesser offense because it does not protect the same societal interests as the other offenses. See *Perry*, *supra* at 62 (noting that the crime of accessory after the fact is akin to obstruction of justice, and that laws forbidding obstruction of justice clearly serve a different purpose than those that forbid the taking of a life). In *Perry*, *supra* at 63 n 19, the Court further noted that the prosecution had not charged the defendant as an accessory after the fact, and that the defendant's request for an instruction on accessory after the fact "was in the nature of a motion to amend the information," the denial of which was not an abuse of discretion.

Further, in the instant case, if the jury had doubt as to defendant's participation in the robbery or home invasion, it could have convicted him only of the receiving and concealing charge. In addition, defendant did not overcome the presumption that counsel's failure to request the instruction was sound trial strategy. Defendant's theory of the case was that he had absolutely nothing to do with the crimes and was merely in the wrong place at the wrong time. An instruction which automatically implied that defendant was involved in the crimes would have undermined this theory.

IV

Defendant's last argument is that he was denied his constitutional right to be present at a critical stage of the proceedings when the prosecution and defense counsel wrote answers in response to the jury's questions without first consulting defendant. We disagree.

Constitutional issues are reviewed de novo on appeal. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996). A criminal defendant has a right to be present during any critical stage of a trial where his substantial rights may be adversely affected. *People v Parker*, 230 Mich App 677, 689; 584 NW2d 753 (1998). The defendant's right to be present extends to instructions to the jury. *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984). However, this Court has determined that it is not error for a trial court to send tape recorded jury instructions into the jury room during deliberations, that it is not an abuse of discretion for a trial court to deny a jury's request to rehear tapes of testimony, and that rereading testimony to the jury in the defendant's absence was not error. See *People v White*, 144 Mich App 698, 702-704; 376 NW2d 184 (1985), and cases discussed therein, including *People v Carey*, 125 Mich 535; 84 NW 1087 (1901).

The transcript indicates that the jury asked several questions regarding Jones' testimony, but the questions are not transcribed or preserved in the record. The transcript reveals that the attorneys played Jones' testimony for themselves and wrote out answers to the jury's questions verbatim[3]. Thus, the answers contained Jones' own words and should be considered a mere read-back. Under *White*, reading back of testimony outside the defendant's presence was held not to be error. Further, defendant has not shown how he was prejudiced by the trial court's allowing counsel to hear the tapes of the testimony and writing answers to the jury's questions. Therefore, defendant has failed to show that he was denied his constitutional right to be present during a critical stage of trial.

Affirmed.

/s/ Helene N. White
/s/ Harold Hood
/s/ Kathleen Jansen

[1] Counsel argued:

> Also, Your Honor, in this –this particular case, there are some –some additional things that are involved in terms of this statement by Mr. Jones.
>
> Apparently Mr. Jones became known to the police because there was the implication that one of his friends, a Gordon Mitchner, was in fact a –the third suspect in this particular case, and in a way of exonerating his friend Gordon, he comes in and says that Mr. Terry has said this information to him.
>
> Also, in taking a look at this, you see the information, in terms of what is actually said, is he simply says, Drey Unknown Other Name, name, which means doesn't know who he is, doesn't know what else his name is. There's no other corroborating evidence that put Mr. Terry and Mr. Cathron together on that particular day.
>
> I think that this is a real stretch that is gonna be a really – a – an unfair inference on behalf of Mr. Cathron that the jury's gonna draw to say that this person is –that Andre Cathron is in fact Drey.
>
> I don't believe that it's admissible against Mr. Cathron, and I think this court should rule that this particular statement by Mr. Jones that supposedly was made by Mr. Terry is unreliable and would be unreliable and would in fact be hearsay as to Mr. Cathron and, because of that, should not be admitted.

[2] The argument was as follows:

> MR. BEAUVAIS: Thank you, Judge.

The argument and the objection was – is that clearly whatever Stephen Terry had to say would be –in terms of his testimony—would certainly—on two fronts: one, it would be hearsay as to Mr. Cathron—it clearly is hearsay; it's an out of court statement and clearly should not be admissible. In addition to that, as to any problems there may have been with –with Bruton, though there's not a co-defendant here. We can't –the **problem is we can't cross-examine** who said the statement. And that can't be done because, number one –**well, that may be cured because Mr. Terry may testify.** But as to the, **though there's not a co-defendant here**. But as to the Poole case, Your Honor, I think that the Poole case deals with whether or not it's reliable testimony. What we have in this particular case is – is Jemein Jones, who is testifying and has testified that he was the alibi for a good friend of his, Gordon Mitchner, and that, you know, what he's telling us is that a statement made by a person named Stephen, who he didn't even know his last name at that particular time, made this statement to him.

And that statement is – As the Court saw, his memory was not particularly reliable at either time, and in addition to that, what he states is clearly that – that Stephen Terry had never been to his house, and he had moved recently and somehow Stephen Terry ends up at his house.

I think that that makes it highly unreliable and because of that it should have been – should not have been—allowed to be brought in.

I understand the Court's ruling. The Court has already given us the ruling in the – in chambers. I just wanted to make a record as to my objections and the reasons for that objection.

THE COURT: Very well. Mr. Petrides, anything you with to add?

MR. PETRIDES: . . . . I'm simply gonna say that under –it's hearsay but it's an exception under 804B(3) of the Michigan Rules of Evidence as interpreted by People versus Poole. And rather than repeat all of the analysis that we went into great detail, I would simply invoke the argument that I made at that time which I referred to in Chambers when the Court gave an indication that you were gonna stick with the same ruling you made back in August. And I'll leave it at that.

THE COURT: Okay. You do concur, though, that Mr. Beauvais did make a timely objection?

MR. PETRIDES: Yes, he did. He wanted to make sure he had every opportunity to ask you to revisit this before Mr. Jones testified, not afterwards. You made your ruling in chambers and said we'd make the record afterwards. And so he did make the timely objection.

THE COURT: Okay. Anything else you want to add, Mr. Beauvais?

MR. BEAUVAIS: Just simply, Judge, to incorporate the argument that I made at the prior trial. And I know that I incorporated that when we talked in chambers, and I understand the Court's ruling in light of Poole.

THE COURT: Very well. What's the next issue that we have to –

MR. BEAUVAIS: Judge, I think **the next issue is to find out whether or not Mr. Terry is gonna testify.**

THE COURT: Can we have him brought down?

MR. BEAUVAIS: Yeah, he's upstairs.

THE COURT: Okay. I would note for the record that Mr. Jeffrey Clotheier is in the court – local counsel that is on the criminal appointment list. And Mr. Terry does have an appellate lawyer but he's located in either Wayne County or Oakland County. And I'd like to have Mr. Clothier at least talk to Mr. Terry. If his preference is to talk to him privately I'd have no objections to that.

And then the thought was, as we discussed this in chambers, was to – **if in fact Mr. Terry wants to testify,** at least let him testify initially in the absence of the jury sot that we don't commit error in the presence of the jury that would affect the trial of this cause.

[3] Following the return of the verdict, there was a discussion regarding jury questions and responses:

MR. PETRIDES: If I could just briefly make a record of the questions.

I believe there was one question that you consulted Mr. Beauvais and I about and - as to testimony - and sent that answer back in. And that's on paper. And the second one, answers were drafted by Mr. Beauvais and I after we listened to the tape here in the courtroom, and that was sent back in there to the jury.

* * *

Mr. BEAUVAIS: For the record, Judge, that is correct. And the testimony that we listened to - it was written down word for word from the testimony as to the answers to those questions.